IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 116 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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CHIRAGBHAI ARVINDBHAI DESAI - Applicant(s)
Versus
DEVSMITHABEN NARENDRABHAI PATEL & 3 - Opponent(s)

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Appearance :
MR PV HATHI for Applicant(s) : 1,
None for Opponent(s) : 1,
RULE NOT RECD BACK for Opponent(s) : 1.2.1,1.2.3
RULE SERVED BY DS for Opponent(s) : 1.2.2
MR DF AMIN for Opponent(s) : 2 - 4.

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 01/03/2007

ORAL JUDGMENT

1. Chiragbhai, applicant, original plaintiff has filed this Revision Application under Section

115 of the Code of Civil Procedure with a prayer that this Court may be pleased to quash and set aside the order dated 19.10.2002 passed by the learned 8th Civil Judge (S.D.), Nadiad below application No.38 of 2002. This Revision application was filed on 5.12.2002.

2. This Court has passed the orders on 27.1.2004 and thereafter, on 13.9.2005, 27.9.2005 and 15.2.2006.

3. On behalf of respondent No.2 to 4, original defendant, herein respondent No.1 Pushpaben D/o. Ambalal Zaverbhai was appearing. It appears that during the pendency of the proceedings, she has expired and her heirs and legal representatives - Devsmithaben Narendrabhai Patel, Balendrabhai M. Amin and Mukesh @ Raju M. Amin, respondents No.1/1 to 1/3 respectively appeared as per amendment carried out as per order dated 31.3.2005 in Civil Application No.3535 of 2004.

4. On behalf of respondent No.2 - Shardaben D/o. Zaverbhai Patel, respondent No.3 - Vijaybhai Nathubhai Patel and respondent No.4 - Mineshbhai Natubhai Patel, Mr. D.F. Amin, learned advocate appears.

5. It appears that respondents No.1/1 to 1/3 are not served and only respondent No.1/2 is served.

6. Mr.P.V. Hathi, learned Senior Counsel appears on behalf of the applicant.

7. The facts giving rise to this petition are as under :

7.1 There are an agricultural land being Survey No.1238/1 admeasuring 1 Acre 31 Gunthas was agreed to be sold by respondent No.1, Pushpaben D/o. Ambalal Zaverbhai and respondent No.2, Shardaben D/o. Ambalal Zaverbhai to the

grand-father Navjibhai Gokalbhai of the plaintiff for Rs.10,000/- and the possession was handed over and one of the conditions was to convert the said new tenure land into old tenure land. In view of this, the sale deed could not be executed though the major part of the pruchase amount of Rs.9,000/- was already paid by the grand-father of the plaintiff. Meanwhile, original defendants No.2 and 3 were trying to dispose of the land in favour of respondent No.3 and 4 and to some other persons. In view of the same, Regular Civil Suit No.24 of 1992 was filed for declaration and injunction before learned Civil Court, Nadiad on 9.1.1992 by the original plaintiff against all four respondents.

7.2 The plaintiff had initially engaged an advocate Shri R.S. Kadri to appear on his behalf but it has been averred in the application for condonation of delay (see page 2 para) that as Shri R.S. Kadri expressed his inability the plaintiff had engaged advocate Shri A. J.

Brahmbhatt and he had argued interim injunction application Exhibit 5 and was accordingly in-charge of the matter. In fact, Shri A.J. Brahmbhatt, learned advocate argued interim injunction application Exhibit-5, which came to be rejected. Being aggrieved and dissatisfied with the said order, the appeal was filed and the learned Appellate Court, Nadiad allowed the said Appeal No.131 of 1992 on 27.2.1997.

7.3 Being aggrieved and dissatisfied with the said order passed below application Exhibit 5, original defendants filed Revision Application before this Court, which came to be rejected on 21.7.1997. Accordingly, the suit had not proceeded beyond the hearing of interim application Exhibit 5 upto July 1997.

7.4 It appears that learned advocate Mr. A.J. Brahmbhatt who was attending the case on behalf of the plaintiff before the lower court expired on 5.11.1997 and when the suit came up for

hearing on 28.1.1998 Shri R.S. Kadri, learned advocate initially engaged by the plaintiff and was not looking after the suit thereafter, appeared in the Court and as averred in the Revision Application para 3 he had requested the Court to issue the notice to the plaintiff and at that time, the applicant – plaintiff had not information about the said date of hearing of the suit. Learned advocate Shri Kadri had also expired on 2.4.2001 and accordingly he was not available to say anything on the date on which the present application for condonation of dealy (Exh.4) was filed on 28.8.2002.

7.5 The learned trial Court having been satisfied that Shri Kadri was not appearing in the suit issued a notice on 16.2.1998 calling upon the plaintiff to remain present on 19.2.1998 but he said notice Exhibit 52 was not served on the plaintiff and his fake signature seems to have been made on the said notice.

7.6 Thereafter, the learned Civil Judge dismissed the suit on 19.2.1998 for default of appearance of the applicant on the assumption that the plaintiff was served with the notice dated 16.2.1998.

7.7 The said fact of dismissal of the suit never came to the knowledge of the plaintiff till 12.8.2001.

7.8 The plaintiff, applicant on coming to know of the said order of dismissal of the suit on 12.8.2002, made an application Exhibit 47 on 28.8.2002 for restoration of the suit along with the application explaining the delay of 4 years and 161 days in filing the said application for restoration of the said Civil Suit. The said application was filed on 29.8.2002 giving reasons in the said suit for condonation of delay. The said application was supported by the affidavit of the applicant, plaintiff. The said application was resisted by the defendants, herein

respondents by filing their reply at Exhibit 10 and contended inter alia that there was gross negligence on the part of the plaintiff as he did not remain present to prosecute the suit after the receipt of the notice from the learned court and the present application was filed after a pretty long time and the same is not bonafide and the delay does not require to be condoned. The said reply was filed on 13.9.2002.

7.9 At the time of hearing, the plaintiff produced necessary documents along with affidavit of advocate Shri J.B. Jani. The plaintiff, applicant also made an application on 17.2.2002 to refer the so called notice of the Court dated 16.2.1998 said to have been signed by the plaintiff to the handwriting expert as his case in the application for restoration was that the same was not received by him and that the signature was not his signature. The said application Exhibit 4 for restoration of the said Civil Suit, dismissed for default on 19.2.1998.

7.10 The learned Civil Judge (S.D.), Nadiad heard the parties and rejected the application of the plaintiff on 19.10.2002.

7.11 Being aggrieved and dissatisfied with the said order dated 19.10.2002, the present petitioner, original plaintiff has filed Civil Revision Application before this Court.

8. I have heard Mr. P.V. Hathi, learned senior counsel for the petitioner. He submits that the learned trial Judge did not refer the dispute with regard to signature on the so called notice. The applicant, original plaintiff himself approached the handwriting expert with admitted and disputed signature and obtained his opinion on 28.11.2002. The handwriting expert has specifically opined that the disputed signature on the reverse page of summons dated 16.2.1998 is not written by the writer of the standard signature on the last page of the Court's order

dated 26.1.1999 and the application dated 9.1.1992. The handwriting expert has given detailed reasons as to why he has come to that opinion from comparison of the two signatures of the plaintiff, applicant. The learned advocate has produced the handwriting expert report on 28.11.2002 and he has relied upon the reasons furnished by the said expert, Shri K.R.S. Pillai, a retired Chief Examiner of Questioned Documents, Government of Gujarat, Gandhinagar.

9. The learned Senior Counsel further submitted that as the learned trial Judge has committed obvious error of law and he has committed material irregularity in exercise of his jurisdiction, the application has no other alternative but to approach this Court by filing the Civil Revision Application challenging the order of the learned trial Judge, whereby the learned trial Judge was pleased to refused to condone the delay.

10. The learned Senior Counsel submits that the learned trial judge has erred in rejecting the application though the applicant, plaintiff has shown sufficient cause for condonation of delay. He further submitss that the learned trial Judge has failed to appreciate that the plaintiff had reasons to believe that his suit of 1992 could not have been taken up for hearing in 1998, when the Civil Suit of prior years were yet to be disposed of by that Court as was informed by his advocates.

11. The learned senior counsel also submits that the learned trial Judge ought to have referred the matter to the handwriting expert for his opinion for finding out the genuineness of the signature obtained on the notice issued by the Court. calling upon him to remain present on 19.2.1998.

12. The learned Senior Counsel also submits that the learned trial Judge ought to have

granted the application made for referring the document to handwriting expert's opinion before deciding the application Exhibit 4 and has accordingly acted illegally and with material irregularity in holding that it was not necessary to seek such opinion. The contention of the applicant that he had not received the notice issued by the Court on 16.2.1998 and that the signature on the said notice was not of him, are now substantiated by the expert's opinion, as can be seen from opinion of handwriting expert dated 29.11.2002, which is annexed with this petition.

12. The learned Senior Counsel submits that the learned trial Judge has seriously erred in relying upon the affidavit filed by one Shri Jr. Kantawala, learned advocate. As against the affidavit and other documents produced by the applicant - plaintiff including the affidavit of another learned advocate Mr. Jani and therefore, the order of the learned trial Judge based on the affidavit of Mr. Kantawala, learned advocate is

required to be quashed and set aside.

13. The learned Senior Counsel has relied upon the judgment decided by the Division Bench of this Court (Coram : K.M. Mehta and Akil Kureshi, JJ.) in the case of **C.S. Jardosh and Ors. Vs. Somabhai Ranchhodbhai Patel, Power of Attorney, N.S. Patel reported in 2006 (2) GLH 339** wherein, the Division Bench of this Court has considered several judgments of the Hon'ble Supreme Court and has held that when the Court has considered Section 5 of the Limitation Act, 1963 and this Court has been making a justifiably liberal approach has to be applied after refering other judgments, the learned trial Judge has not considered that aspect also.

14. Mr. D.F. Amin, learned advocate has vehemently opposed the aforesaid Revision Application.

15. I have considered the peculiar facts and circumstances of the case. It will be noted that

originally the petitioner engaged advocate Mr. R.S. Kadri and on behalf of Mr. Kadri, learned advocate, Mr. A.J. Brahmbhatt, learned advocate appeared and argued out before the lower court. Ultimately, the order was passed and ultimately, the Revision Application was filed. So, upto July, 1997, the plaintiff was not aware about any proceedings.

15.1 On 5.11.1997, when Mr. A.J. Brahmbhatt, learned advocate has expired, Mr. R.S. Kadri, who was real advocate had attended the matter. When the matter was come up for hearing on 8.1.1998, he was not fully aware with the matter because originally Mr. A.J. Brahmbhatt, learned advocate argued the matter and in view of the same, the court issued notice to the plaintiff to engage the advocate. Though same was not served to the plaintiff, but the fake signature of the plaintiff was found upon the notice. In view of this fake signature of the plaintiff, the learned trial Judge dismissed the suit for default.

16. Meanwhile, Mr. R.S. Kadri, learned advocate has also expired, who was original advocate for the plaintiff on 2.4.2001 and thereafter, the plaintiff came to know all these facts only in August, 2001 because the suit was dismissed for default in this behalf. In all all these facts and circumstances, the word "Sufficient Cause" in Section 5 of the Limitation Act has to be considered in light of the facts of the case.

16.1 Each case has to be decided on the basis of the facts disclosed in each case. In the case of Collector, Land Acquisition Officer Vs. Katiji, AIR 1987 SC 1353, the Hon'ble Apex Court has held that while considering the sufficient cause, the Court should adopt liberal approach. So also the approach of the Court must be to do an even handed justice on merits in preference to the approach which scuttles a decision. The Court has to place himself in the position of the

applicant or appellant, as the case may be, and find out if the delay can be said to have resulted from the cause which he had alleged and whether it can be regarded in the peculiar circumstances of the case to be sufficient. In proper case the court has to exercise its discretion in favour of the applicant. Court should not adopt unduly rigid or overstrict view. The scope of enquiry must be limited to the facts which are relevant. It cannot embark on an enquiry as to why the party was siting idle all the time available to it.

16.2 The Hon'ble Supreme Court has laid the above principles in several decisions repeatedly. It is observed that the expression “Sufficient cause” should liberal construction so as to advance substantial justice and ordinarily delay in filing the appeal should be condoned when negligence, inaction or want of bona fide is imputable to the appellants and that in an application for condonation of delay “Sufficient

cause" should receive liberal construction so as to advance substantial justice. The expression cannot be constructed as cause beyond the control of the party.

16.3 Considering the facts and circumstances of the case, particularly, when the learned advocate appearing on behalf of the plaintiff and opponents have expired and the plaintiff could not aware that the suit was taken up for hearing immediately because earlier proceedings were heard during the pendency of the proceedings of Civil Revision Application.

17. On the other hand, I have considered the reasons assigned by the learned trial Judge in this behalf. The learned trial Judge has not properly considered the provisions of Limitation Act, particularly, Section 5 of the Act. Though the plaintiff has tried to give cogent and convincing reasons, the learned trial Judge has

not properly appreciated and refused the plaintiff's application.

18. In view of the same, the order dated 19.10.2002 below application Exhibit 4 of the learned trial Judge is required to be quashed and set aside and the same is quashed and set aside . The Civil Revision Application is allowed. The learned trial Judge is requested to hear and dispose of the main Misc. Civil Application No.38 of 2002 on merits as early as possible preferably by 31.7.2007 with no order as to costs.

(K.M. MEHTA, J.)

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